Supreme Court, U.S.
FILED
OCT 18 2000
CLERK

(2)

No. 00-270

In The

Supreme Court of the United States

RICHARD M. DALEY, *et al.*,

Petitioners,

v.

CLUB MISTY, INC.,
doing business as TEQUILA ROADHOUSE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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28pp

QUESTION PRESENTED

Whether the Seventh Circuit properly interpreted Illinois law as requiring "cause" for the revocation of Illinois liquor licenses, and whether the court then properly determined that a targeted referendum by which a small group of residents vote on whether a licensee deserves to have its license voided deprives a licensee of property without due process of law.

RULE 29.6 STATEMENT

Respondent Club Misty, Inc., d/b/a Tequila Roadhouse has no parent company, and no publicly held company owns 10% or more of Club Misty's stock.

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STATUTES INVOLVED

Section 9-2 of the Illinois Liquor Control Act, 235 ILCS 5/9-2 (1998).

STATEMENT

Since before the early 1980s, when Respondents, Alberto Bedoya, d/b/a Casanova's, Inc. ("Bedoya") and Club Misty, Inc., d/b/a Tequila Roadhouse ("Club Misty"), were first granted Illinois liquor licenses, Illinois law has entitled liquor licensees to retain their licenses unless the licensee is found to have engaged in some conduct providing cause for revocation or non-renewal. See *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983). Respondents have operated their respective establishments in Chicago for some two decades, and the record reveals no hint that either has ever given any cause to have its liquor license revoked or not renewed. Yet had the Seventh Circuit not granted them relief, Respondents' licenses would have been voided, and their longstanding businesses destroyed, by targeted referenda held in late 1998 and early 1999. These referenda were conducted pursuant to a 1994 Illinois statutory provision that allows the majority of the participating voters in a Chicago precinct – a few hundred voters – to prohibit the sale of alcohol at the address of a specific establishment (hereinafter, the "Targeted Referendum Provision" or the "Provision"). See 235 ILCS 5/9-2.

These targeted referenda stand in stark contrast to the kind of general local-option-referenda that traditionally have been used in Chicago and many other areas.

See 235 ILCS 5/9-2. A general local-option-referendum asks the voters of a political unit whether they wish to prohibit the sale of liquor throughout the entire political unit; a targeted referendum asks whether a particular establishment's license should be revoked even though liquor sales will continue to go forward within the political unit. In *Philly's v. Byrne*, 732 F.2d 87 (7th Cir. 1984), the Seventh Circuit upheld the constitutionality of general local-option-referenda on the ground that due process was satisfied because "[t]he requirement that the precinct electorate act across the board shows that the judgment that the voters are asked to make is legislative rather than adjudicative in character." *Id.* at 92. The court distinguished the general local-option-referenda it upheld from targeted referenda that focus on individual establishments. See *ibid.* ("the Illinois act does not permit the precinct's voters to single out a particular liquor seller to shut down.").

Five years after the decision in *Philly's* the Illinois legislature enacted a provision allowing voters in Chicago precincts to hold referenda on the fate of individual licensees. The statute was promptly struck down as violating the Due Process Clause. See *87 South Rothschild Liquor Mart v. Kozubowski*, 752 F. Supp. 839 (N.D. Ill. 1990). In 1994, however, the Illinois legislature tried again, amending the statute to allow voters of Chicago precincts to decide whether a licensee at a specified address should lose its right to sell liquor. 235 ILCS 5/9-2. It was pursuant to this 1994 enactment that targeted referenda were held on the future of Respondents' licenses.

Threatened with the destruction of their livelihoods, Respondents filed an action in the United States District Court for the Northern District of Illinois challenging the Targeted Referendum Provision on a number of grounds, including a claim that the targeted referenda deprived them of property without due process of law. In so arguing, Respondents relied on settled Seventh Circuit precedent holding that Illinois liquor licenses constitute "property" for purposes of the Due Process Clause because Illinois law entitles a licensee to retain the license unless the licensee does something that provides "cause" for revocation. See, *e.g.*, *Reed*, 704 F.2d at 949. The District Court rejected Respondents' due process claim, holding that because the newly enacted Targeted Referendum Provision empowers voters to void licenses without cause, Respondents no longer possess property interests in their liquor licenses. Pet. App. 36a-53a.

The Seventh Circuit reversed. Pet. App. 10-20a. Writing for the majority, Judge Posner explained that, even after passage of the Targeted Referendum Provision, Illinois law continues to protect a licensee's right to hold its license so long as the licensee does not provide cause for revocation. Looking at the language, structure, and history of the provision, the court explained as follows:

> Illinois could if it wanted forbid such sale [of liquor] altogether; it certainly is not required to give liquor licensees the attributes of constitutional property. But it has given them those attributes, as we have seen, and the challenged statute does not purport to remove them. It creates no new substantive criteria for the grant

> or withdrawal of Illinois liquor licenses. Nothing in it purports to alter the "for cause" condition that makes those licenses property within the meaning of the due process clause. * * * All the referendum statute does is provide an alternative procedure for revocation of liquor licenses. This is apparent from the legislative history, as we are about to see. The supporters of the statute believed that it would provide a swifter alternative to administrative procedures for revoking the licenses of "bad apples," which is to say licensees who had given cause for revocation.

Pet. App. 7a-8a. The court then held that targeted referenda do not provide a constitutionally adequate procedure for determining whether a licensee had done anything to provide just cause for revoking its license. Pet. App. 8a-13a.

Although Judge Bauer dissented from the majority's ultimate holding, he did not dissent from the court's conclusion that an Illinois liquor license continues to constitute property given the nature of Illinois law. See Pet. App. 14a-20a.[1]

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[1] As Petitioners acknowledge, Judge Bauer's dissent takes issue only with the panel majority's conclusion on the second step of the due process analysis – whether the Targeted Referendum Provision provides adequate process. Pet. 16 n.6. Petitioners have not argued that this latter question independently justifies granting a writ of *certiorari*.

REASONS FOR DENYING THE PETITION

This case fits none of this Court's criteria for the granting of *certiorari*. See United States Supreme Court Rule 10. To begin with, the decision by the Seventh Circuit does not, in any sense, "conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a). Petitioners have invented conflicts with the Eighth and Tenth Circuits by citing cases so irrelevant to this case that Petitioners never cited them below. As will be seen, neither of these decisions conflicts with the decision of the Seventh Circuit in any way.

Nor do Petitioners even suggest that the Seventh Circuit "has decided an important federal question in a way that conflicts with a decision by a state court of last resort." *Ibid*. The best that Petitioners can do in this regard is to argue that the Seventh Circuit's longstanding position that Illinois liquor licenses are property conflicts with some decisions of the Illinois Appellate Court. Such conflicts with an intermediate appellate court plainly fail to qualify under this Court's Rule 10. Moreover, the conflicts in this instance reflect nothing more than the fact that the Illinois Appellate courts have not reevaluated the vitality of several antiquated precedents that were decided long before this Court established the modern approach for defining constitutional "property." In any event, as we will explain, given the nature of the Petitioner's argument, this case presents no vehicle for this Court to resolve the issue upon which the Seventh Circuit and the Illinois Appellate Court disagree.

Finally, Petitioners can make no persuasive claim that the issue decided by the Seventh Circuit is one that necessarily should be "settled by this Court," or that the Seventh Circuit has decided "an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). Instead, the Seventh Circuit's decision reflects nothing more than a court applying well-settled constitutional principles to a specific fact pattern – and reaching a decision consistent with the decision of every other federal court to have confronted the question.

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT IN THIS CASE AND ANY OTHER UNITED STATES COURT OF APPEALS.

Three federal courts have considered the constitutionality of targeted referenda such as the one at issue here, and each has held that such referenda violate the due process rights of liquor licensees. See Pet. App. 1a-20a (decision of the Seventh Circuit in this case invalidating the Illinois Targeted Referendum Provision); *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991) (striking down Ohio's targeted referendum statute), cert. denied, 506 U.S. 820 (1992); *87 South Rothschild Liquor Mart v. Kozubowski*, 752 F. Supp. 839 (N.D. Ill. 1990) (striking down the predecessor of the provision challenged here). Each of these courts held that the Due Process Clause protects licensee's interest and that the Clause was violated by allowing a small group of local voters to decide the fate of a licensee's livelihood. There

is no conflict between any federal decisions on this issue. Nor is there any conflict among federal courts on the more general question of whether a liquor licensing system such as that used in Illinois creates constitutionally protected property interests.

Instead, Petitioners argue that a conflict among the circuits exists on the abstract question of "how to evaluate the role of discretion in the licensing process." Pet. at 7. The two cases upon which Petitioners rely to demonstrate such a conflict reveal that no such conflict exists.

In the first of the cases upon which Petitioners rely, the United States Court of Appeals for the Tenth Circuit held that an individual's interest in the *renewal* of livestock grazing allotments at the same level as the previous allotment did not constitute a protected "property" interest. *Federal Lands Legal Consortium v. United States* [hereinafter, *FLLC*], 195 F.3d 1190 (10th Cir. 1999). The court based this conclusion on the relevant statutes and regulations that granted the Secretary of Interior unfettered discretion to decide whether to renew grazing permits and whether to set new limits on grazing allotments as part of the renewal process. See *id.* at 1198. Thus, the court concluded that permit holders have no "legitimate claim of entitlement to the terms and conditions of their previous permits." *Id.* at 1100. At the same time, though, the court cautioned that it was not deciding whether holders of allotments have property interests during the terms of their permits. *Id.* at 1198 n.7.

There is absolutely no tension, much less a conflict, between the Tenth Circuit's approach in *FLLC* and the Seventh Circuit's approach in this case. The Tenth Circuit

merely held that because renewal of grazing allotments was a matter of administrative grace, no property interest accrued. The Seventh Circuit agreed explicitly with this principle, explaining that were it the case that Illinois liquor licensees held their licenses as "a matter of administrative grace," they would have no property interest in renewal of their licenses. App. to Pet. 4a. The Seventh Circuit's holding that Illinois liquor licensees enjoy property interests was based on its conclusion that under Illinois law "[t]he license is revocable only for cause." *Ibid.* Although Petitioners obviously disagree with the Seventh Circuit's analysis of Illinois law on this point (a matter we address at *infra* 15-17), that disagreement about the proper interpretation of Illinois law hardly creates a conflict between the approaches of the Tenth and Seventh Circuits – courts that agree fully on the relevant governing principles.

Petitioner's effort to suggest a conflict between the decision below and the Eighth Circuit's decision in *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716 (8th Cir. 1995), is equally flawed. The court in *Movers Warehouse* looked at the relevant statutes and regulations that governed renewal of bingo licenses in a specific Minnesota city, and concluded that, although the relevant laws may "create a property interest in an existing license," there were no standards at all with reference to renewals of licenses. *Id.* at 719. The court's resulting holding – that the licensee's unilateral expectation of renewal did not qualify as a protected property interest – was an unexceptional application of settled precedents. Indeed, the Seventh Circuit cited *Movers Warehouse* approvingly for the proposition that there is no property

interest in license renewals where renewal is a manner of "administrative grace." Pet. App. 4a. The fact that Minnesota law treats bingo licenses differently from the way Illinois law treats liquor licenses hardly indicates any conflict between the circuits.

Despite the fact that all three courts agreed on the relevant legal principles, Petitioners try to create the impression of a conflict by mischaracterizing the nature of the state and local laws at issue in *FLLC* and *Movers Warehouse*. According to Petitioners, both *FLLC* and *Movers Warehouse* involved cases in which the relevant laws conferred "specified entitlements on the licensee." Pet. 9. As the courts made clear in those cases, however, there were no such entitlements to renewal in either situation. Rather, renewal was completely discretionary. See *FLLC*, 195 F.3d at 1200 ("the statutory scheme gives the Forest Service discretion to change the terms and conditions during the permit renewal process"); *Movers Warehouse*, 71 F.3d at 720 ("state law places no substantive limitations on the discretion of the licensing authority").

Here, by contrast, the Seventh Circuit concluded that Illinois law entitles a licensee to retain its license absent cause for revocation. Based on the language of the statute, the structure of the law and the intent of the legislature, the Seventh Circuit concluded that the referendum system was not intended to make liquor licenses terminable at will, but was intended to create a new mechanism for deciding whether there is "cause" to revoke a license. See Pet. App. at 7a (holding that Illinois has given its liquor licensees "the attributes of constitutional property * * * and the challenged [referendum] statute does not purport to remove them. * * * Nothing in it purports to

alter the 'for cause' condition that makes those licenses property within the meaning of the due process clause"). As we mentioned above, Petitioners disagreement with the Seventh Circuit's conclusions about Illinois law does not transform this case into one in which courts conflict over governing legal principles. There is complete concordance among the Seventh, Eighth and Tenth Circuits on the relevant legal standards for assessing whether a license creates a property interest, and there is no conflict for this Court to resolve.

II. THE SEVENTH CIRCUIT HAS NOT DECIDED ANY IMPORTANT FEDERAL QUESTION IN A MANNER THAT CONFLICTS WITH A DECISION BY A STATE COURT OF LAST RESORT.

Petitioners' primary contention in support of its request that the Court grant *certiorari* is that a conflict exists between the Seventh Circuit's decision and a series of Illinois Appellate Court cases. Unlike their attempt to invent a conflict among the United States courts of appeals, Petitioners are correct to point out that there is disagreement between the Seventh Circuit and the Illinois Appellate Court on the general issue of whether Illinois liquor licenses qualify as property for due process purposes. This conflict has existed since 1983, when the Seventh Circuit first analyzed the status of Illinois liquor licenses under the constitutional standards established by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). See *Reed*, 704 F.2d at 943.

In *Reed*, the Seventh Circuit held that because Illinois liquor licenses could be revoked or not-renewed only for cause, these licenses qualifies as property for due process purposes. *Id.* at 949. The court in *Reed* stressed that the relevant inquiry is a functional one that looks at whether "under Illinois law a liquor license is securely and durably the licensee's." *Id.* at 948. The court explained that even though the Illinois Liquor Control Act had long declared that liquor licenses are not "property," but are instead "privileges," the use of the word

> '[p]roperty' in the Illinois Liquor Control Act need not mean the same thing as 'property' in the due process clause. *Perry v. Sindermann*, 408 U.S. 593 (1972), the companion case to *Roth*, held that a teacher's tenure contract creates a species of property, though it would not be so described under state law. And the rights of welfare recipients, though also not property in the conventional sense, were held in *Goldberg v. Kelly*, 397 U.S. 254, 261-62, (1970), to be property for purposes of the due process clause. Liquor licenses in Illinois cannot be sold or bequeathed and are limited in other ways that deprive them of some of the conventional attributes of property, but this does not mean they are not property in a due process clause sense.

Reed, 704 F.2d at 947.

The Illinois appellate courts have not followed *Reed*. See, *e.g.*, *Blue Cat Lounge, Inc. v. License Appeal Commission*, 281 Ill. App. 3d 643, 647, 667 N.E.2d 554, 557 (Ill App. Ct. 1996); *Ross v. Kozubowski*, 182 Ill. App. 3d 687, 691, 538 N.E.2d 623, 626 (Ill. App. Ct. 1989). Instead, they have continued to follow an obviously obsolete 1908 decision

of the Illinois Supreme Court holding that liquor licenses do not constitute property as that term was defined long ago. See *People v. McBride*, 234 Ill. 146, 179, 84 N.E.2d 865, 872-73 (1908).

The Illinois appellate cases have never engaged in any re-analysis of this issue in the aftermath of *Kelly*, *Roth*, *Perry* or the many other due process decisions of this Court over the past three decades. Indeed, only one of the Illinois decisions ever acknowledged the existence of these decisions, or the Seventh Circuit's decision in *Reed*. See *Black Knight Restaurant, Inc. v. City of Oak Forest*, 159 Ill. App. 3d 1016, 513 N.E.2d 109 (Ill. App. Ct. 1987). The court's holding in *Black Knight* that the state statute's declaration that licenses are not "property" is determinative of the constitutional inquiry (*id.* at 1019, 513 N.E.2d at 111), is flatly inconsistent with this Court's pronouncement that "although the underlying substantive interest is created 'by an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 602). The Illinois Supreme Court has not yet confronted the status of Illinois liquor licenses under modern due process jurisprudence.

There is a reason that this Court's Rule 10 does not include conflicts with an intermediate state court as a justification for issuing a writ of *certiorari*. At the moment, we have no idea how the Illinois Supreme Court will deal with the constitutional status of Illinois liquor licenses when it has occasion to confront the question. If the Illinois Supreme Court ultimately disagrees with the

Seventh Circuit, there will be a proper opportunity for this Court to consider whether *certiorari* is appropriate. At the moment, though, there is no conflict that justifies *certiorari*.[2]

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[2] Petitioners also refer to two other conflicts between various state and federal courts regarding the status of liquor licenses in other jurisdictions. Pet. at 6-7. Once again, these purported conflicts provide no support for Petitioners' request that this Court grant *certiorari* here. Petitioners first assert that the decision in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991), cert. denied, 506 U.S. 820 (1992), is at odds with decisions of Ohio courts which have "long held that a license is not property." Pet. 6. Petitioners cite to a 1935 decision of the Ohio Supreme Court to support this supposed conflict, but, as the court in *Brookpark* noted, more recent Ohio decisions have acknowledged that Ohio liquor licenses might qualify as constitutional property. See *Brookpark*, 951 F.2d at 716 (citing *Scioto Trails Co. v. Ohio Dep't of Liquor Control*, 11 Ohio App. 3d 75, 80, 462 N.E.2d 1386, 1391 (Ohio Ct. App. 1983), and *Rickard v. Ohio Dep't of Liquor Control*, 19 Ohio App. 3d 133, 138, 504 N.E.2d 724, 729 (Ohio Ct. App. 1986)). Indeed, decisions from the Ohio Appellate Court after *Brookpark* reveal that any remaining disagreement is working itself out without this Court's assistance. See *Hi Rise, Inc. v. Ohio Liquor Control Commission*, 106 Ohio App. 3d 151, 156, 665 N.E.2d 707, 711 (Ohio Ct. App. 1995) (recognizing that although federal decisions such as *Brookpark* "are not binding upon us, they do make points we consider worthy of reconsideration"); *State v. Hall*, No. 93AP-346, 1993 WL 310399, at *1 (Ohio App. 10 Dist. Aug. 10, 1993) (relying on *Brookpark* to grant partial relief to party who lost his liquor license through a targeted referendum).

Petitioners next claim a rift between the New Jersey Supreme Court of the 1950's and a fourteen-year-old decision from the District of New Jersey, *Sea Girt Restaurant & Tavern Association, Inc. v. Borough of Sea Girt*, 625 F. Supp. 1482 (D.N.J.), aff'd mem., 802 F.2d 448 (3d Cir. 1986). Pet. 6. Petitioners omit,

There is, moreover, another major flaw in the Petitioners' assertion that this Court should review the Seventh Circuit's decision in order to resolve the conflict between the Seventh Circuit and the Illinois Appellate Court. This case does not present an appropriate vehicle to resolve the conflict between the courts on this question because Petitioners do not urge reversal based on the reasoning or holding of the Illinois appellate courts. Petitioners do not argue that Illinois liquor licenses generally are not property – as the Illinois courts have held. As the Seventh Circuit observed, Petitioners did "not challenge any of" the Seventh Circuit's cases holding that liquor licenses generally constitute property. Pet. App. 5a. Rather, Petitioners argued below and argue here that, notwithstanding *Reed* and the other cases holding that Illinois liquor licenses qualify as property, the Targeted Referendum Provision affects the scope of a licensee's property interest. See Pet. App. 6a ("The City denies that a liquor license is property for a reason unrelated to *Reed* – that the challenged statute so eviscerates the rights of liquor licensees as to destroy their status as owners of constitutional property.").

The Seventh Circuit's rejection of Petitioners' argument on the impact of the Targeted Referendum Provision

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however, that the court in *Sea Girt* reached its conclusion that New Jersey liquor licenses were constitutional property by relying on "the sound reasoning of the New Jersey Supreme Court" in *The Boss Co., Inc. v. Board of Commissioners*, 40 N.J. 379, 385, 192 A.2d 584, 588 (1963) (agreeing that "a liquor license can be classified as 'property' for federal purposes despite a [state] legislative pronouncement to the contrary."). See *Sea Girt*, 625 F. Supp. at 1487-88.

does not conflict with any decision of an Illinois court – no Illinois court has ever confronted that question. It is clear, then, that this case does not present a suitable vehicle for settling the conflict Petitioners have identified – whether Illinois law generally creates a property interest in liquor licenses. Even were this Court to grant *certiorari* and decide the case in accordance with Petitioners' arguments (*i.e.*, hold that the Targeted Referendum Provision means that licensees in Chicago possess no property interest if the voters oust them), the conflict between the Seventh Circuit and the Illinois appellate courts on the general question of whether liquor licenses are constitutional property would continue to exist.

III. THE SEVENTH CIRCUIT'S DECISION IS FULLY CONSONANT WITH THE DECISIONS OF THIS COURT AND DOES NOT OTHERWISE INVOLVE AN ISSUE OF SUCH MAGNITUDE THAT IT MUST BE SETTLED BY THIS COURT.

Despite Petitioners' efforts to depict this case as involving some significant issue of constitutional methodology, Petitioners' only dispute with the Seventh Circuit turns on the way that the Seventh Circuit analyzed Illinois law in the aftermath of the Targeted Referendum Provision. Petitioners contend that the Targeted Referendum Provision dramatically altered Illinois law, making all liquor licenses revocable at the whim of the electorate, regardless of whether the licensee has done anything wrong, or caused any harm. The Seventh Circuit did not read Illinois law in this manner, though. Instead, its analysis of the entire Illinois Liquor Control Act, including

the Targeted Referendum Provision, led it to conclude that "[n]othing in [the Provision] purports to alter the 'for cause' condition that makes licenses property within the meaning of the due process clause." Pet. App. 7a.

In support of this conclusion, the Seventh Circuit looked to the language and structure of the Act. *Ibid.* The court also cited to the legislative history of the provision, which made it clear that the legislature was not empowering residents of a precinct to destroy a business-owner's livelihood at whim. Rather, the provision was designed to close down licensees who are "causing real problems * * * This will not penalize the good licenses in these areas, but will only target that bad operator." Pet. App. 9a (quoting Statement of Rep. McGann in the Transcript of General Assembly, June 27, 1989, at 138-39). See also Pet. App. 9a (provision will allow the closing of "a particular tavern that's causing a tremendous problem. I have a lot of them in my district, where you have drug dealers, where you have prostitution, where you have knifings and shootings.") (quoting Statement of Sen. Marovitz in Transcript of General Assembly, July 1, 1989, at 3).

The Seventh Circuit refused to accept the idea that a provision that was sold to the legislature as affecting only bad licensees, in fact was designed to allow for the revocation of a licensee who is behaving perfectly and whose establishment is causing no problems. Hence, the Seventh Circuit concluded that all the Targeted Referendum Provision "does is provide an *alternative procedure*" for terminating offending licensees. Pet. App. 7a

(emphasis added).[3] It was that "alternative procedure" that the court found to violate the Due Process Clause, based on this Court's unequivocal holding in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). See Pet. App. 7a.

The Seventh Circuit did not ignore any of this Court's teachings; it applied those teaching to the Illinois statute, according to its interpretation of the Targeted Referendum Provision – an interpretation with which no court at any level has disagreed. The Seventh Circuit's conclusion that Illinois liquor licenses remain a species of property therefore involves nothing more than the case-specific application of settled legal principles about which even the parties in this case do not disagree.[4]

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[3] Although Petitioners challenge this analysis of Illinois law, Petitioners themselves acknowledge at various points that the Targeted Referendum Provision was not designed to give "unfettered discretion" to a few hundred neighbors. See, *e.g.*, Pet. 14 ("The referendum process gives the affected community the ability to address these *problem establishments*") (emphasis added); Pet. 16 n.5 (provision affects a "licensee that is disturbing its community").

[4] In light of the Seventh Circuit's interpretation of Illinois law, the court had no occasion to consider Respondents' claim that the Targeted Referendum Provision could not possibly affect a licensee's property interest. The fact that the Provision empowers voters in a precinct to *effect a change in the law* and to restrict liquor sales does not mean that a licensee lacks a property interest, any more than the general power of any legislature to prospectively change the law defeats the creation of a property interest. Every license (and every other form of entitlement) is held under that potential cloud. For example, ever since *Goldberg v. Kelly*, 397 U.S. 254 (1970), it has been recognized that welfare recipients can have property interests in

Ultimately, then, Petitioners are relegated to arguing that this Court should grant *certiorari* because the decision of the Seventh Circuit "poses serious problems for municipalities struggling to address the problems associated with the sale of alcoholic beverages." Pet. 13. Petitioners repeatedly describe the Provision as a "crucial mechanism" (*id.* 4), an "important option" (*id.* 5), and "an important community-driven mechanism" (*id.* 13). It is difficult to take these characterizations very seriously though, given the fact that only two jurisdictions in the entire Country have ever tried to use targeted referenda, and both efforts were struck down as violations of due process. Moreover, even in Illinois, the Targeted Referendum Provision applies only in the City of Chicago. See 235 ILCS 5/9-2 (Provision applies only to city, village or town of more than 200,000 inhabitants). There is, to be sure, a venerable history of liquor-related referenda over the last 100 years (Pet. 14-15), but these referenda have all involved permissible general-local-option-referenda, which qualify as valid *general* decisions on whether any liquor sales should be allowed in the entire political unit. They have not involved *targeted* referenda about whether a particular individual deserves to lose his or her license to sell liquor.[5]

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their future benefits. This is true even though any welfare recipient always lives with the threat that the laws will change and the benefit program will be removed or modified. Of course, any change in the law must comport with due process – which targeted referenda do not.

[5] The distinction between general and targeted statutes traces back to the Supreme Court's decisions in *Bi-Metallic Investment Co. v. State Bd. Of Equalization*, 239 U.S. 441 (1915),

The "crucial mechanism" for controlling individual licensees in this Country has been through license revocation proceedings before duly constituted liquor control commissions. Petitioners claim that some "defects in the revocation process from the community's perspective" justify abandoning the protections that this adjudicative process provides. Pet. 15. For example, Petitioners express frustration over the difficulty of convincing local prosecutors to commence revocation proceedings. *Ibid.* Petitioners complain also that the majority of the members of the state agency that reviews revocations in Illinois are appointed by the Governor, meaning that these members are "not only unaccountable to the residents living in the affected neighborhoods, but far more likely to be influenced by the liquor lobby than the welfare of individual neighborhoods." *Ibid.* To the extent that these parochial complaints about the Illinois regulatory system reflect real problems, Petitioners are entitled to work within the state legislature to improve the regulatory system. It is unreasonable, however, for Petitioners to suggest that factors such as the political allegiances of members of the Illinois Appeal Commission transform

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and *Londoner v. Denver*, 210 U.S. 373 (1908). These cases, which Petitioners never mention, establish the bedrock rule that a person affected by a "general statute" is not entitled to indvidualized due process, but when specific individuals are the targets, then a right to a hearing is indispensable. See generally *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245 (1973) ("[l]ater decisions have continued to observe the distinction" between *Bi-Metallic* and *Londoner*).

this case into one of national significance that merits this Court's review.[6]

As the Seventh Circuit explained, "the guarantee of due process would mean little if it could be dispensed with upon a showing, which could be made in every case, that a remedy that provides no procedural safeguards at all will be faster and cheaper than one that provides some." Pet. App. 9a. For all the concern that Petitioners express about the community's interest in closing down offending establishments without providing any hearings, Petitioners afford no weight to the rights and interests of a licensee who is the subject of a targeted referendum.

Determining how much process is due in a particular context requires a balancing of competing considerations, including the "private interests that will be affected by

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[6] Petitioner's cursory claim that this case implicates important Twenty-First Amendment concerns is unfounded. Petitioners cannot, and do not, take issue with the rule that

> "although the Twenty-First Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution.' " *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984)). See also *Craig v. Boren*, 429 U.S. 190, 206 (1976) ("Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale of liquor is concerned.").

the official action." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Here, the deprivation is extreme. Licensees often invest their life savings and energies into building up an establishment. It is not unusual for the licensee's family (as well as families of the establishment's employees) to be financially dependent on the establishment. All that the Seventh Circuit held in this case is that licensees in Illinois are entitled to traditional due-process protections against baseless termination of their right to do business. Every court to consider the issue has agreed.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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OCTOBER 18, 2000